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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 587

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,

vs.

DELL R. COX,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

Your Petitioner respectfully shows:

I. Summary and Short Statement of the Matter Involved

This petition is sought to review the majority decision of the Court of Appeals for the Fifth Circuit (Holmes, Circuit Judge, dissenting) on a second appeal of this case, affirming judgment for Plaintiff.

Dell R. Cox, hereinafter referred to as Respondent, brought this suit against Railway Express Agency, herein after referred to as Petitioner, in the District Court of the United States for the Northern District of Texas, at Lubbock. The pleadings on which the second trial was had are the same as were before the Court of Appeals on

the former appeal, and the testimony is substantially the same, except that no rules of the company were introduced in evidence on the second trial. Respondent alleged that he was shot in his right leg and foot when the gun which he was carrying in the course of his employment fell out of the holster and struck the floor of the baggage car.

The *only* alleged negligence of Petitioner on which the trial Court instructed the jury in his oral charge was the failure of Petitioner to issue the pistol in question *set upon an empty chamber.* This paragraph of the Court's charge whereby the jury was permitted to find for Respondent reads as follows:

> "Now if you find and believe from a preponderence of the evidence that at the time the pistol and holster in question were delivered to the plaintiff at El Paso the pistol was not then set on an empty chamber, and that the defendant's failure to have the pistol set on an empty chamber at that time was negligence; and if you further believe from a preponderance of the evidence that any such negligence was the proximate cause of the plaintiff's injury when he was shot in the leg at the time in question, then and in that event you will return your verdict in this case for the plaintiff; and under the circumstances and contingencies which I have just explained, you will still so return a verdict for the plaintiff even though you may also believe that the plaintiff himself was negligent in some respect or respects, which contributed with negligence of the defendant, so that such negligence of both parties concurring became the proximate cause of the plaintiff's injury; but unless you find for the plaintiff within the terms of liability that I have just explained to you, then your verdict here will be for the defendant." (Tr. 172).

The jury returned a verdict for Respondent and assessed his damages in the sum of Ten Thousand and No/100 ($10,000.00) Dollars.

No issue was submitted to the jury with reference to the *holster,* and Respondent waived the submission of any such issue by failing to object to the Court's charge, and such issue is no longer in this case.

The evidence shows that Petitioner issued Respondent the gun and holster at El Paso, Texas, on August 6, 1947, and it was on the return trip from Big Spring back to El Paso the next day that Respondent suffered the injury of which he complains (Tr. 38-40).

There is not one word of testimony in this record that Petitioner issued Respondent the gun *not set upon an empty chamber.*

The only evidence in this case which in any way even remotely tends to support a recovery by Respondent is *the sole fact that the gun did go off.*

II. Jurisdiction

Petitioner respectfully submits that this Court has jurisdiction by virtue of 28 U. S. C. A. Section 1254(1).

The Judgment of the Court of Appeals affirming the judgment of the trial Court (Holmes, Circuit Judge, dissenting) was entered December 27, 1950 (Tr. 188). The Order Denying Rehearing (Holmes, Circuit Judge, dissenting) was entered January 30, 1951. The Court of Appeals has stayed the Mandate for thirty days from February 8, 1951, and thereafter until this cause is finally disposed of by the Supreme Court.

III. Questions Presented

1. There being no evidence that Petitioner delivered Respondent the gun in question *not set on an empty chamber* (this being the only issue of negligence submitted), it was error on the part of the trial Court to refuse Petitioner's Motion for instructed verdict.

2. There being no testimony showing that this Petitioner was guilty of negligence in the issuance of the gun in question, or otherwise, the Court of Appeals erred in affirming the judgment of the trial Court.

3. The Court of Appeals having ruled on the former appeal of this case that if Petitioner were guilty of negligence that was a primary and proximate cause of the accident it was in the furnishing of a holster which the recipient could not reasonably be expected to fasten, and Appellee and the trial Court having abondoned such issue, the Court of Appeals erred in affirming the judgment of the trial Court.

IV. Reasons Relied On for the Allowance of the Writ

1. The decision of the majority of the Court of Appeals is in conflict with a decision of this Court and its own prior decision and the decision of another Circuit, in that it did not apply the decisions of the Appellate Courts of Texas on the question of the sufficiency of the evidence to support the submission of a claim to the jury.

2. The majority of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in two particulars:

(a) It has allowed a recovery of $10,000.00 (Ten Thousand Dollars) damages on the ground that the gun was issued to Respondent *not set on an empty chamber*; whereas there is not one word of testimony to such effect. This holding is tantamount to a taking of property without due process of law.

(b) The majority has, without assigning any reason, departed from its holding on the former appeal that the only basis of recovery by Respondent would be the issuance by Petitioner of a defective holster.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket, No. 13,302, Railway Express Agency, Inc., Appellant v. Dell R. Cox, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals for the Fifth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted, this 2nd day of March, 1951.

J. H. MOOERS,
GEORGE W. GIBSON, JR.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Where This Case Is Reported

The opinion of the Court of Appeals on the first appeal of this case is reported 179 F2d 593. The opinion of the majority of the Court of Appeals and the dissenting opinion of Judge Holmes on the second appeal of this case are reported 185 F2d 909.

II. Argument

A. On Numbers 1 and 2(a) of the Reasons Relied on for the Allowance of the Writ:

This Court will readily see that the substance of our points under the heading "Questions Presented" in the Petition is that the trial court erred in submitting the issue as to Petitioner's issuance of the gun *not set on an empty chamber* for the reason that there is not one word of testimony to support a finding for Respondent on such issue, and that any other theory of recovery by Respondent was abandoned by the trial Court and by Respondent by reason of the Court's failure to submit any other theory of recovery and by reason of Respondent's failure to object to the Court's charge (Tr. 176). Petitioner has properly preserved these points by its Motion for Instructed Verdict which was by the Court overruled prior to the submission of the case to the jury and by its exception to such ruling of the Court (Tr. 13 and 26), and by its objections to the Court's charge (Tr. 176-179).

Petitioner respectfully urges this Court to look through these mere factual and procedural vehicles to the utter disregard of fundamental principles of proof and justice by the trial Court and the Court of Appeals, which we sincerely believe are so flagrant as to call for this Court's

power of supervision. Not only did both lower courts fail to follow the local decisions on the sufficiency of the evidence to go to the jury, *but they have violated every principle in the books on the law of circumstantial evidence.* This is tantamount to a taking of property without due process of law. We will make this argument as brief as possible, but of necessity we will, in this argument, be forced to bring out certain salient facts and circumstances, to show the flagrancy of the lower courts' utter disregard of the law of circumstantial evidence.

To sustain a recovery by Respondent on the one fact that *the gun did go off,* the lower courts have necessarily indulged each of the following inferences:

1. That the gun either (a) fell out of the holster, or (b) was pulled out by the wire mesh;
2. That the gun struck the floor;
3. That the gun discharged when it struck the floor;
4. That the hammer of the gun was on a loaded chamber at the time it went off;
5. That the gun was set with the hammer on a loaded chamber at the time it was issued Respondent at El Paso;
6. That the safety device was defective;
7. That Petitioner was guilty of *negligence* in issuing a gun with the hammer set on a loaded chamber;
8. That such negligence was a *proximate cause* of Respondent's injury.

The Texas decisions hold that where there must be such a pyramiding of inferences to support a recovery, the primary evidence (that the gun did go off) is too remote and provides merely a basis for a surmise or conjecture and will not support a jury finding in favor of Plaintiff. Community Natural Gas Company v. Henly, Texas Commission of Appeals, 24 SW2d 10; International Travelers

Association v. Bettis, 120 Tex. 67, 35 SW2d 1040; Green v. Texas & P. Ry. Co., 125 Tex. 168, 81 SW2d 669; Texas Pacific Coal & Oil Company v. Wells, 151 SW2d 927, 164 SW2d 660; Latimer v. Walgreen Drug Company of Texas, 233 SW2d 209, 213. In a suit in Federal Court, where jurisdiction is based on diversity of citizenship, as in this case, the Federal Courts should follow the state decisions with reference to the question whether or not the evidence is sufficient to raise an issue for the jury. Stoner v. New York Life Insurance Co., 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284 (U. S. S. Ct. 1940); General Accident, Fire & Life Assurance Corp. v. Schero, 160 F2d 775 (5th Circuit 1947); Waldron v. Aetna Casualty & Surety Company, 141 F2d 230 (3rd Circuit 1944).

To point up lower courts' utter disregard of the most fundamental principles of proof, we respectfully call this Court's attention to these undisputed facts and circumstances: The pistol in question is here before this court as an exhibit. By successive manipulations of the hammer back and forth, without ever pulling the hammer back to a cocked position, you can revolve the chamber indefinitely. Plaintiff's own gunsmith testified on direct examination that the gun could have fired by catching on the wire mesh (Tr. 115). The undisputed testimony of the witness, Earl Scovel, (who examined the gun immediately after the accident) is that there *was an empty chamber* and that the discharged bullet was in the second chamber over from this empty chamber (Tr. 96). The X-Ray pictures which were introduced in evidence and which are before this Court as an exhibit show that the course of the bullet ranges *downward* from slightly above the ankle downward toward the arch of the foot, from whence it was removed. Respondent testified, on direct examination, that immediately before the accident the gun had been on his belt and that he had pushed it back around behind him; that he was

sliding up and down the heavy wire mesh grill work; that immediately after the accident he found the gun on the floor behind him (Tr. 40-41).

We submit that the inference that the gun discharged when it struck the floor is absolutely necessary to a recovery by Respondent, because had the gun discharged by reason of the hammer catching in the wire mesh and being pulled back and then struck a bullet, *the chamber would have revolved;* and therefore, even if the gun had been issued on a loaded chamber, such issuance on a loaded chamber would not have been a cause in fact, let alone a proximate cause of Respondent's injury. The inference that the gun discharged when it struct the floor is wholly inconsistent with the direction that the bullet traveled, down Respondent's leg and foot. It would have been a physical impossibility for the bullet to have taken such a course down his leg and foot had the gun discharged when it struck the floor. We submit that the more logical inference to be drawn from Respondent's sole primary fact (that the gun did go off) is that the hammer caught in the wire mesh, revolved the chamber and discharged the bullet. This is the only inference consistent with Respondent's own testimony concerning the circumstances at the time of the accident and the position in which he was standing at the time the gun discharged and the course the bullet followed down his leg and foot; and thus it is that even if the gun were set with the hammer resting on a loaded chamber, same would not be a cause in fact of the injury, let alone a proximate cause of Respondent's injury.

Assuming for argument that the rules of the company were in evidence and assuming further that the clerk issuing the gun was required thereby to issue the gun with the hammer resting on an empty chamber, it must be presumed, in the absense of proof to the contrary, that he did

what was required by the rules and did the careful, prudent thing.

We respectfully submit that by proving only one fact that in any way even remotely tends to support a recovery by Respondent (that the gun did go off), said Plaintiff has wholly failed to carry his burden of proof to make out a cause of action, and that in entering and affirming a judgment on a verdict based on just that one fact (that the gun did go off), the lower courts have violated the most fundamental principle of the law of circumstantial evidence; that inferences must be based on probabilities and not mere possibilities. To cite but a few of the many cases so holding: Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041; New York C. R. Co. v. Ambrose, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562; Kentwood Lumber Co. v. Illinois Cent. R. Co. (5th Circuit) 67 F2d 663; Bonner v. Tex. Co. (5th Circuit) 89 F2d 291; Schnidley v. Allen-Sherman-Hoff Co., 157 F2d 102.

Furthermore, as above mentioned, the inference necessary to a recovery by Respondent that the gun discharged when it struck the floor, is a physical impossibility in view of the undisputed facts and circumstances.

For the lower courts arbitrarily to allow a recovery of $10,000.00 damages on inferences that do not follow from the only fact proved (that the gun did go off) is a taking of property without due process of law, and is as much a violation of the Fifth and Fourteenth Amendments as it is for Congress arbitrarily to make a presumption of law on facts that do not support it. *Tot* v. *U. S.* 319 U. S. 463, 87 L. Ed. 1519.

B. On No. 2(b) of the Reasons Relied on for the Allowance of the Writ:

On the former appeal of this case (reported 179 F2d 593), the Court of Appeals made this clear analysis in its opinion:

> "It must be conceded that if the flap on the holster had been fastened the pistol would not have fallen to the floor, and the accident would not have happened. The plaintiff did not allege that the flap on the holster could not be fastened but that it was difficult to fasten. The holster, or what purported to be the holster, was introduced in evidence and has been sent here as an exhibit. It was demonstrated in the trial below that the flap could be fastened. We have examined it and find the the holster can be fastened and when fastened is difficult to unfasten. Whether it is in the same condition as when issued to plaintiff is a question of fact. The plaintiff testified that when the holster was issued to him at El Paso he discovered that he was unable to fasten it, but being in a hurry, he did not call the agent's attention to this fact. *It seems to us that if the defendant was guilty of negligence that was a primary and proximate cause of the accident it was in the furnishing of a holster which the recipient could not be reasonably expected to fasten.* Whether the appellee could have been expected to fasten the holster would have been judged by what a reasonably prudent person in appellee's position could, or should, have been able to do, or should have done. *The plaintiff did not describe what efforts he made to close the flaps. A question of fact was presented which would have had to be resolved against the Company by the jury before it could have found that the issuance of the pistol to appellee without the hammer resting against an empty chamber was the proximate cause of the accident, because if the retaining flap on the holster had been fastened properly the pistol could not have fallen to the*

floor and the accident could not have happened as claimed . . ." (Emphasis ours).

Not only did the trial Court completely disregard the law of the case as above announced by the Court of Appeals on the former appeal of this case, but the above quoted portion of the court's charge (under the heading Summary and Short Statement of the Matter Involved, in the Petition) was further prejudicial to the rights of this Petitioner in that it told the jury: "You will still so return a verdict for the plaintiff even though you may also believe that the plaintiff himself was negligent in *some respect or respects.*" . . . Thus leaving the jury free to find for plaintiff even though plaintiff himself may have been negligent in failing to snap the holster, (this in the face of the undisputed testimony of the witnesses, Earl Scovel and E. A. Conley to the effect that the holster is in the same condition as when issued to plaintiff (Tr. 96-99 and 138-143)); the testimony of the plaintiff wholly failing to disclose what efforts, if any, he made to snap the holster (Tr. 54-55).

The various circuits, including the fifth circuit, have announced the doctrine of "the law of the case" to be that the Court will as a matter of policy and practice be disinclined to re-open legal issues which have on a former appeal been fully considered and settled. *American Cynamid Co.* v. *Toomer Fertilizer Co.,* 5th Circuit, 51 F2d 666; *A. T. & S. F. Ry. Co.* v. *Ballard,* 5th Circuit, 108 F2d 768; *Commercial Nat. Bank* v. *Connolly,* 5th Circuit, 176 F2d 1005; *U. S. F. & G. Co.* v. *Commercial Nat. Bank,* 5th Circuit, 62 F2d 718; *General American Life Ins. Co.* v. *Anderson,* 6th Circuit, 156 F2d 615; *Chicago St. P. & M. O. Ry. Co.* v. *Kulp,* 8th Circuit, 102 F2d 352; *Pike Rapids Power Co.* v. *Minneapolis St. P. & S. S. M. Ry. Co.,* 8th Circuit, 106 F2d 891.

The Eighth Circuit expressed the idea this way in *White* v. *Higgins*, 116 F2d 312, at page 317:

> "The first question to consider is whether we should upon this second appeal reconsider our previous decision on Section 219(g) and (h). The doctrine of 'law of the case' is not an inexorable command. It 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.' Citing cases. Though the power exists to reopen the points of law already decided, it is a power which will necessarily be exercised sparingly, and only in a clear instance of previous error, to prevent a manifest injustice. The doctrine of the law of the case is normally a salutary one in the interest of economy of effort and of narrowing down the issues in successive stages of litigation. In the absence of exceptional circumstances, it would be unfortunate if on second appeal counsel felt free to argue do novo as a matter of course the points decided on previous appeal."

As is so aptly stated in Judge Holmes' dissenting opinion on the second appeal of this case, for a Court of Appeals to give the trial Court such keen, clear cut instructions as are above set out in the opinion on the former appeal, and then on the second appeal condone the trial Court's complete disregard of said Court's former opinion without in any manner purporting to reconcile its two holdings, demonstrates the complete confusion created by the opinion of the majority on second appeal, and the necessity for granting this writ.

Petitioner has endeavored to stay within the spirit as well as the letter of this Court's Rule 38 by confining this brief to the Reasons Relied on for the Allowance of the Writ, but will, if this Court sees fit to grant the writ of certiorari, endeavor to help the Court by fully developing

its points under the heading "Questions Presented" in the Petition.

Respectfully submitted,

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